United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7151

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-7151

LOUIS LONGO,

Plaintiff-Appellee,

—against—

CARLISLE DECOPPET & CO.,

Defendant-Appellant.

APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
DENYING MOTION TO DISMISS

JOINT APPENDIX

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TABLE OF CONTENTS

Docket Entries

DATE	PROCEEDINGS
07-03-75	Filed complaint and issued summons.
08-18-75	Filed summons with marshals return served—anyone at Company authorized to receive service of process by Keenan on 8-5-75.
08-26-75	Filed deft. affdvt. and notice of motion for an order pursuant to rule 12(b)(6) dismissing the complaint. ret. on 9-11-75.
08-26-75	Filed deft's memorandum of law in support of above motion to dismiss the complaint
09-17-75	Filed stip. and order adj. deft's ret date for motion to 9-25-75—Stewart, J.
09-24-75	Filed pltf. affdvt. in opposition to deft's motion to dismiss the complaint.
09-24-75	Filed pltf's memorandum of law in opposition to motion to dismiss the complaint
10-22-75	Filed Memorandum # 43276 This matter is before the court upon deft's motion to dismiss the complaint This standard is based on sex stereotypes concerning proper male and female hair lengths. Deft's motion to dismiss is denied—Stewart, J. m/n
11-03-75	Filed stip. and order ext. deft's time to answer the complaint to 11-21-75—Stewart, J.
11-24-75	Filed deft. affdvt. and notice of motion for an order amending this court's order of 10-22-75, staying further proceedings and granting other relied. ret. 12-4-75

Docket Entries

DATE	PROCEEDINGS
11-24-75	Filed deft's memorandum of law in support of above motion.
11-26-75	Filed pltf. affdvt. and notice of cross-motion denying, compelling and for such other relief ret. 11-25-75
11-26-75	Filed pltfs memorandum in support of above motion
11-02-75	Filed deft. Reply affdvt. to pltf's papers in opposition to deft's application to amend
11-02-75	Filed deft's Reply memorandum
02-26-76	Filed Memo. end. on notice of motion docket as document # 10 Motion to certify pursuant to rule 28 is granted. Motion to stay further proceedings in the district court is also granted—Stewart, J. m/n
03-02-76	Filed notice of entry of an order filed and entered on 2-26-76
03-09-76	Filed memo. end. on document # 12 Motion denied without prejudice to renewal of the application for interim expenses in the event that the action proceeds to trial—Stewart, J. m/n
03-11-76	Filed notice of entry of order entered on 3-9-76
03-26-76	Filed notice of original record on appeal has been certified and transmitted to the U.S.C.A. for the Second Circuit on 3-26-76

Docket Entries

DATE	PROCEEDINGS
03-26-76	Filed bond for costs on appeal in amount of $250.00 (Fidelity & Deposit Insurance Co. of Maryland)
03-29-76	Filed true copy of U.S.C.A. Order that the motion for the deft. Petitioner for leave to appeal is granted m/n

A TRUE COPY

RAYMOND F. BURGHARDT
Clerk

By G. HARBISON
Deputy Clerk

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Index No. 75 Civ. 3276

LOUIS LONGO,

Plaintiff,

—v.—

CARLISLE DECOPPET & CO.,

Defendant.

Plaintiff, complaining of the defendant by his attorneys Coles and Weiner, respectfully shows this Court:

1. This Court has jurisdiction of this action pursuant to 42 U.S.C. §2000(e) 5 et seq. (Civil Rights Act of 1964, Title VII).

2. At all times hereinafter mentioned the defendant Carlisle DeCoppet & Co. (hereafter referred to as "Carlisle") was and is a member firm of the New York Stock Exchange with its place of business in the Southern District of New York, in the City, County and State of New York.

3. Plaintiff was employed by defendant from July 15, 1965 to December 3, 1971; as Senior Clerk, in his last promoted position with defendant.

4. On or about December 2, 1971 plaintiff was charged with making a mistake on a comparison of a stock transaction which allegedly took place on or about the 21st or 22nd of November 1971.

5. At that time, on or about the 2nd day of December, 1971, plaintiff was told by the personnel manager of Carlisle, Al Hayes, that he was being terminated because of that mistake.

6. Up until that time plaintiff's work record had been completely satisfactory to defendant.

7. For the year and one half immediately prior to this incident in paragraph 6 above, plaintiff had worn his hair over his ears, just touching his shirt collar. Commencing in July of 1971 his immediate supervisor, Charles Coleman, Trade Control Manager of Carlisle, began, around July 1 of 1971 and continuing thereafter, to pass derogatory remarks about plaintiff's hair style and length.

8. Plaintiff, whose hair had been thinning on top, during this period went to a hair replacement specialist and had the top of his hair replaced at a cost in excess of $1,000.

9. Plaintiff went on a scheduled vacation in November of 1971, the month prior to his being fired by Carlisle.

10. At the time of his firing, Charles Coleman, his immediate supervisor, told him that the main reason he was being terminated was his hair length, not the error he had made.

11. On information and belief, the cost of the error for which plaintiff was allegedly fired was borne equally between the defendant Carlisle and its customer, negating any inference in the defendant's trade of sole error on its employee, plaintiff's, part.

12. Plaintiff had been warned to wear his hair behind his ears or suffer dismissal, in November of 1971, upon return from his vacation, which order he tried to comply with.

13. Plaintiff commented to Coleman, upon Coleman telling him that the main reason he was being fired was his hair length and style, that female employees wear their hair as they see fit; to which Coleman replied to plaintiff, "you're not a girl", or words of similar import.

14. Plaintiff was and is a male.

15. On information and belief, the Company dictates no policy of hair style for its female employees, who like plaintiff work in the "back office" and do not have direct customer contact on a face-to-face basis.

16. For the above reasons, plaintiff was discriminated against in the terms and conditions of his employment, and illegally discharged by defendant, through the acts of its officers and agents and employees, Charles Coleman and Al Hayes.

17. On or about the 19th of December 1973, the Equal Employment Opportunity Commission made a determina-

tion in plaintiff's favor that the defendant had violated Title VII of the Civil Rights Act of 1964 in its treatment of plaintiff.

18. Plaintiff has been given a right to sue letter by the Equal Employment Opportunity Commission pursuant to Federal law.

19. Plaintiff has timely brought suit under such letter.

WHEREFORE, your plaintiff prays for judgment of this Court:

1. Reinstating him to his former position at Carlisle with all back pay, allowances, pension and profit sharing rights, vacation pay, holiday pay, and step increases to which he would otherwise have been entitled had his employment been continuous to the date of reinstatement from December 2, 1971;

2. Counsel fees, pursuant to statute;

3. Such other and further relief, including a declaratory judgment that plaintiff, and all other male employees are free pursuant to the 1st, and 9th Amendments, U.S. Constitution, the guidelines of the Equal Employment Opportunity Commission, and the statutes including but not limited to 42 U.S.C. §2000(e)5 *et seq.*, to wear their hair at any length they see fit with due consideration for the employer-defendant's obligations under the Occupational Health and Safety Act governing hair length around certain

operative machinery, as to this Court may seem just and proper in the premises.

Yours, etc.,

COLES and WEINER

by HAROLD M. WEINER
Harold M. Weiner
1775 Broadway
New York, N. Y. 10019
972-1278

Memorandum of Judge Stewart Denying Defendant's Motion to Dismiss

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 3276

LOUIS LONGO,

Plaintiff,

—against—

CARLISLE DECOPPET & CO.,

Defendant.

STEWART, *District Judge*:

This matter is before the court upon defendant's motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Plaintiff Louis Longo, a former employee of the defendant, has brought this action under Title VII of the Civil Rights Act of 1964 ("the Act"), 42 U.S.C. §2000e *et seq.* He alleges that defendant discharged him because his hair was longer than defendant's grooming regulations permitted. Defendant does not require its female employees to conform to the short hair length standard applied to the plaintiff. Plaintiff contends, therefore, that defendant's action dismissing him constitutes sex discrimination in violation of §703(a) of the Act, 42 U.S.C. §2000e-2(a). He seeks reinstatement with back pay, and all other rights and bene-

fits to which he would have been entitled had his employment been continuous. Defendant, admitting solely for purposes of this motion, the factual allegations of the complaint, has moved to dismiss on the ground that applying different hair length standards to male and female employees does not constitute sex discrimination within the meaning of §703(a) of the Act.

On July 15, 1965, plaintiff was hired as a junior clerk by defendant. He was promoted to senior trade control clerk on January 30, 1969 and remained in that position until his discharge on December 3, 1971. About a year and a half prior to his dismissal, plaintiff began wearing a hair piece to cover the top of his hair where he was beginning to go bald. This hair piece came down over his ears and touched his shirt collar. Plaintiff's supervisor made critical remarks concerning the length and style of plaintiff's hair and warned him to wear it behind his ears or suffer dismissal. In late November, 1971, plaintiff made an error in a stock calculation. A week later he was fired. The personnel manager told him that this error was the reason for his dismissal. Plaintiff's supervisor, though, informed him that the main reason for his dismissal was the length of his hair. Plaintiff filed his charge of sex discrimination with the Equal Employment Opportunity Commission ("E.E.O.C.") which found reasonable cause to believe that defendant's different grooming standards for male and female employees violated §703(a), and issued a right to sue letter pursuant to 42 U.S.C. §2000e-5(f)(1).

There is clearly a factual question as to what the grounds were for plaintiff's discharge. The only issue before the

court at this juncture, however, is whether plaintiff's dismissal, if based on a hair length standard applied only to male employees, would constitute sex discrimination within the meaning of §703(a) of the Act. If so, plaintiff has stated a claim upon which this court can grant relief.

Section 703(a) provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex.

Defendant contends that the term "sex" should be construed by this court to include only "gender or other immutable characteristics which the employee has no power to alter." (Defendant's Memorandum, p. 4). It maintains that Congress did not intend §703(a) "to protect hair styles . . . over which the employee has complete control" (Defendant's Memorandum, p. 5), and thus concludes that a discharge on the basis of hair length is not "sex discrimination" within the meaning of §703(a).

Plaintiff disputes this narrow interpretation of the statute and asserts, rather, that "Congress intended to strike

at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" (Plaintiff's Memorandum, p. 4 quoting from *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) *cert. denied* 404 U.S. 991 (1971). Defendant treats its male and female employees differently because it does not require women, as it does require men, to keep their hair a certain length. Plaintiff reasons that, since this disparate treatment is based on the sex stereotype that men should have short hair, he has been discriminated against on the basis of sex within the meaning of §703(a). We agree.

Stated generally, the purpose of Section 703(a) is to require "that persons of like qualifications be given employment opportunities irrespective of their sex." *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544, 91 S.Ct. 496, 497-8, 27 L.Ed.2d 613, 615 (1971). In determining the meaning of the term "sex" within the statute, the legislative history, though meager, makes it clear that Congress did not intend the statute to mean gender alone. An amendment which would have restricted the Act to discrimination based "solely" on sex was rejected by Congress. 110 Cong. Rec. 2728 (1964); *Willingham* v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975).

The E.E.O.C. guidelines indicate that the Commission has determined that "sex" discrimination under the Act includes discrimination "based on stereotyped characterizations of the sexes." 29 C.F.R. §1604.2(a)(1)(ii). The Commission has specifically held in its administrative decisions that hair grooming codes that distinguish between male and female employees are violative of §703(a). Decisions No.

Memorandum of Judge Stewart Denying Defendant's Motion to Dismiss

71-1529 and 72-2179, 2 CCH Employment Practices Guide §§6231 and 6395. These Commission determinations carry great weight in this matter for "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434-5, 91 S.Ct. 849, 854-5, 28 L.Ed.2d 158, 165 (1971).

Further support for this interpretation comes from the holdings in *Phillips, supra,* 400 U.S. 542 (refusal to hire women, but not men, with pre-school children violated §703 (a)) and *Sprogis, supra,* 444 F.2d 1194 (firing female stewardess, but not male stewards, who married violated §703(a)). In both cases, hiring practices that discriminated not on the basis of gender alone, but because of sex stereotypes involving proper domestic sex roles, absenteeism and customer preferences were found to be "sex" discrimination within the meaning of §703(a).

Defendant urges this court to follow the Fifth, Ninth and District of Columbia Circuits which have all held, on the specific question of hair length regulations, that different requirements for male and female employees do not constitute sex discrimination within the meaning of §703(a). *Willingham* v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1974); *Baker* v. *California Land Title Co.*, 507 F.2d 895 (9th Cir. 1975); *Dodge* v. *Giant Food, Inc.*, 488 F.2d 1333 (D.C. Cir. 1973). All three courts decided that the discrimination was beyond the scope of Title VII because it involved a personal attribute which could be easily changed, not an immutable characteristic or fundamental right, and because requiring employees to conform to grooming codes was within the employer's management prerogatives. We decline to follow this reasoning.

Memorandum of Judge Stewart Denying Defendant's Motion to Dismiss

We do not agree that hair length is an insignificant personal attribute. The Second Circuit has held on similar facts involving hair regulations for policemen that "the choice of personal appearance is an ingredient of an individual's personal liberty." *Dwen* v. *Barry*, 483 F.2d 1126, 1130 (2d Cir. 1973). It cannot have been the intent of Congress to allow this basic individual right to be subordinated to an employer's sex stereotypes. We, therefore, adopt the interpretation of sex discrimination expressed in the E.E.O.C. guidelines and administrative decisions as most reasonable and consistent with the policies of §703(a).

In summary, plaintiff has alleged that defendant applies different hair length standards to its male and female employees, and that he was discharged for not conforming to the male standard. This standard is based on sex stereotypes concerning proper male and female hair lengths. We hold that this is sex-based discrimination within the meaning of §703(a) of the Act, and that plaintiff has stated a claim under this statute. Defendant's motion to dismiss is denied.

So Ordered.

Charles E. Stewart
United States District Judge

Dated: New York, N. Y.
October 22, 1975.

Order of Judge Stewart Granting Defendant's Motion to Certify Pursuant to 28 U.S.C. §1292(b) and to Stay Further Proceedings in the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 3276

LOUIS LONGO,

Plaintiff,

—against—

CARLISLE DECOPPET & CO.,

Defendant.

Motion to certify pursuant to 28 U.S.C. §1292(b) is granted. Motion to stay further proceedings in the district court is also granted.

SO ORDERED.

CHARLES E. STEWART
U.S.D.J.

February 25, 1976

Service of one copy is hereby
admitted this 30th day of April, 1976

Coles & Wainer

Attorneys for Plaintiff-Appellee